
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Chapter 13 Case
BRUCE CHARLES BAUMAN)	
)	Number <u>93-41818</u>
<i>Debtor</i>)	

ORDER ON OBJECTION TO CONFIRMATION

The Chapter 13 Trustee filed an objection to confirmation of Debtor's Chapter 13 Plan. Based upon the parties' briefs, the record in the file and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor filed his Chapter 13 case on October 21, 1993. The Debtor's plan contained the following provisions:

Secured creditors shall retain liens securing their claims. Creditors who file claims and whose claims are allowed as secured claims shall be paid the lesser of (1) the amount of their claim, or (2) the value of their collateral as set forth here: [There was no entry valuing the claim of any

secured creditor] . . .

The claims of the State of Georgia and the Internal Revenue Service shall be paid to the full extend (sic) permitted by plan payments. The balance of their claims shall not be discharged by this case.

Debtor's plan also provided for payments of \$113.00 per month for sixty months and proposed a pro-rata dividend to unsecured creditors. The notice issued by the Clerk's Office on October 22, 1993, contains the following language:

If the Plan is not confirmed the Court will consider dismissal of the case without further notice or hearing At confirmation the Court will conduct a hearing on any objections to debtor's claim of exemptions, and any motion to value collateral or avoid liens as set forth in the plan. Objections to the plan, valuation, or lien avoidance shall be filed five days prior to confirmation. A copy of debtor's plan is shown on the reverse side.

Debtor's case was scheduled for confirmation and a hearing was conducted on March 22, 1994. The Chapter 13 Trustee filed a timely Objection to Confirmation on January 18 alleging that Debtor "failed to file Federal and State tax returns, in violation of 11 U.S.C. Section 1325" and prayed that the Court "inquire into the above objection, deny confirmation of this Debtor's plan and . . . dismiss this case." No objection was filed by either the United States or the State of Georgia.

At the confirmation hearing, the Trustee's report revealed that the Debtor's case was delinquent in the amount of \$226.00, the Trustee having received only \$226.00, or two monthly payments, since the filing of the case. The Trustee further revealed that the plan was underfunded and would require \$724.00 per month for 57 months in order to pay claims in the case in accordance with their status as filed, whether secured, unsecured, or priority. The Internal Revenue Service timely filed claims as follows: Claim 5 - \$23,422.38, secured; Claim 6 - \$6,092.94, priority/unsecured; Claim 7 - \$133.77, general unsecured. The total which Debtor's plan would fund for the purpose of retiring all claims - that is, all administrative costs including trustee and attorney's fees, and all secured, priority and unsecured claims, would amount to \$6,667.00. Obviously, even without consideration of other claims in the case, the Internal Revenue Service would receive less than twenty percent of its claims as filed, and allowing for the accrual of interest on the secured claim, would receive even less.

At confirmation, Debtor's counsel stated that he believed payments to the Trustee were actually current in that at least one payment had been forwarded to the Trustee which did not appear on the Trustee's printout. Debtor's counsel further represented that the tax claims arose during an earlier Chapter 13 case which the Debtor had filed and which was dismissed prior to confirmation. Counsel also indicated that Debtor had not met with success in trying to negotiate a payment schedule to retire Debtor's tax obligations, and that

filing a Chapter 13 case paying \$113.00 per month was absolutely the last option Debtor had. Debtor's counsel conceded that payments to the plan would not retire the Service's debt within a period of five years, but stated Debtor wished the opportunity to "pay down" his tax obligation through the plan as much as possible with the balance of the obligation remaining as a non-discharged debt. Debtor believes, at the end of 5 years, the remaining balance will be more manageable, that he will have a substantially higher income, and therefore, will be able to pay the remaining debt without protection of the bankruptcy court.

The Trustee objects to confirmation on the grounds that the plan does not conform to the mandatory requirements of 11 U.S.C. Section 1322(a). The Court permitted all parties in interest ten days in which to brief the issues and briefs have been received from the Debtor and the Trustee.

CONCLUSIONS OF LAW

Section 1322(a) of the Bankruptcy Code provides as follows:

(a) The plan *shall*--

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is

necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

11 U.S.C. § 1322(a) (emphasis added). The requirements of section 1322(a) are mandatory, and a plan that does not comply with these provisions cannot be confirmed. *See* 11 U.S.C. § 1325(a)(1); In re Northrup, 141 B.R. 171, 172 (N.D. Iowa 1991). Moreover, in confirming a plan, a bankruptcy court is charged with an independent duty of review to insure that a plan complies with the provisions of the Bankruptcy Code even in the absence of an objection.. In re Northrup, 141 B.R. at 172; Matter of Timothy Robert Hale, et.al., Ch.13 No. 186-00320, slip op. at 7 (Bankr. S.D.Ga. Oct. 6, 1986), *aff'd*, No. 87-8549 (11th Cir. May 23, 1988) (per curiam).

Trustee asserts that Debtor's plan violates section 1322(a)(2) because Debtor's plan will not pay the IRS' priority claim in full. Debtor does not deny the fact that his plan will not fully satisfy the IRS' priority claim, but argues that the IRS, by not objecting at confirmation, has agreed to its treatment under the plan, thereby satisfying section 1322(a)(2). Trustee concedes that, under the express terms of the statute, section 1322(a)(2)

is satisfied if a debtor can persuade a creditor, who holds a priority claim, to agree to treatment different than that called for in the statute. Trustee contends that such an agreement must be express, however, and a failure on the part of the IRS to object to confirmation does not constitute an agreement as the term is used in section 1322(a)(2). Thus, the question in this case is whether the IRS agreed to its treatment under Debtor's plan when it failed to object to confirmation of the plan.

There has been considerable disagreement among the courts that have considered this issue. One line of cases holds that a creditor who fails to object to its treatment under a Chapter 13 effectively agrees to its treatment for purposes of section 1322(a)(2). See In re Hebert, 61 B.R. 44, 46-47 (Bankr. W.D.La. 1986); In re Lindgren, 85 B.R. 447, 449 (Bankr. N.D.Ohio 1988). The court in Hebert reasoned as follows:

In the case, the IRS has notice of the provisions of the debtor's plan, and failed to raise any objection to its treatment under the plan. Had such an objection been raised, the payments to the IRS could have been raised to include interest, or the court could have ordered that the IRS would retain its lien to the extent its claim was underpaid. However, this court believes that the IRS's failure to object to its treatment under the plan in this case constitutes "agreement" to such treatment under Section 1322(a)(2).

In re Hebert, 61 B.R. at 46-47. Another line of authority holds that a creditor who fails to object to its treatment under a debtor's plan does not, for purposes of section 1322(a)(2), signify its agreement to the proposed treatment. See In re Northrup, 141 B.R. 171, 172 (N.D. Iowa 1991); In re Ferguson, 27 B.R. 672, 673 (Bankr. S.D. Ohio 1982). This line of case requires the debtor to obtain some sort of express assent from the creditor:

After having considered this matter, the court agrees with the bankruptcy court that an express affirmation of consent is required to meet the requirements of 11 U.S.C. § 1322(a)(2). This court believes that the structure of the bankruptcy code and the general meaning of the word "agrees" suggest express consent.

In re Northrup, 141 B.R. at 173.

After reviewing both lines of cases, I am persuaded that the Northrup and Ferguson courts are correct in their construction of the term "agrees" in section 1322(a)(2). The term denotes some sort of affirmative assent on the part of the creditor, and a failure to object does not constitute such assent. Thus, a debtor, who does not propose to fully pay a priority claim in his or her Chapter 13 plan, cannot rely upon the priority claimant's failure to object to the plan as establishing the claimant's agreement to such treatment under section 1322(a)(2). The debtor must show some sort of "express affirmation of consent" on the part

of the priority claimant. In this case, Debtor has not presented any evidence of such consent.

The plan also fails to comply with Section 1322(a)(1), which requires the "submission of . . . such . . . future earnings . . . to the Trustee as is necessary for the execution of the plan." 11 U.S.C. Section 1325(a)(5) requires that secured creditors receive "value" which is "not less than the allowed amount of [the secured] claim." 11 U.S.C. § 1325(a)(5)(B).¹ A portion of the IRS claim was filed as secured, and Debtor's proposed plan will not pay the secured claim in full. Since Debtor has not submitted sufficient future earnings as are necessary for "execution" of a plan which satisfies the requirements of Section 1325(a)(5), the plan fails to conform to the mandatory requirements of Section 1322(a)(1).

¹ Section 1325(a)(5) can also be satisfied if "the holder of [an allowed secured claim] has accepted the plan." 11 U.S.C. § 1325(a)(5)(A). Chapter 13 does not, however, contain a specific provision dealing with how a creditor goes about accepting a Chapter 13 plan. Thus, a question of construction, similar to that presented by section 1322(a)(2), arises: Does a failure on the part of a secured creditor to object to its treatment in a debtor's Chapter 13 plan constitute acceptance for the purpose of section 1325(a)(5)(A). In view of the way in which the term is used in Chapter 11, as well as the way that it was used in Chapter XIII of the former Bankruptcy Act, I conclude that it does not. There is little question that acceptance, as it is used in section 1126 of Chapter 11, contemplates some affirmative act which demonstrates that a creditor approves of its treatment within a Chapter 11 plan. *See* 11 U.S.C. § 1126. Moreover, Chapter XIII of the former Bankruptcy Act required all creditors to accept the plan in writing before a "wage earner" plan could be confirmed. *See* § 651, Article IX of the Bankruptcy Act of 1898. Thus, if Congress had intended that the term "accept" have a different meaning in Chapter 13, it is reasonable to assume that it would have expressed this intent within the text of the Code. It did not, and I therefore rule that the term "accept," as used in Section 1325(a)(5)(A), requires something more than a failure to object on the part of a secured creditor. This conclusion is supported by the legislative history to Section 1325(a)(5)(A). *See* H.R.Rep.No. 595, 95th Cong., 1st Sess., 430 (1977), S.Rep.No. 989, 5th Cong., 2d Sess. (1978).

For the foregoing reasons, Debtor's plan does not meet the statutory requirements for confirmation. Accordingly, Trustee's objection must be sustained and confirmation of the plan denied. Furthermore, since Debtor represented that payments at the level of \$113.00 per month was the maximum he could afford and since the plan requires a minimum of \$724.00 per month to meet the requirements of Section 1322(a)(1) and (a)(2), no modified plan would be feasible. Accordingly, pursuant to 11 U.S.C. Section 1307(c)(1) and (c)(5) the case should be dismissed.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions, IT IS THE ORDER OF THIS COURT that the Objection to Confirmation of the Chapter 13 Trustee is hereby SUSTAINED and the case is dismissed.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of May, 1994.